SUPREME COURT, U.S.
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No. 98-1320

In The

Supreme Court of the United States

October Term, 1998

BSW DEVELOPMENT GROUP,

Petitioner,

vs.

CITY OF DAYTON, OHIO,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of The State Of Ohio

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

In 1984, the BSW Development Group ("BSW") acquired the Wilcon Building at 16-26 South Patterson Boulevard and an adjacent building, which constituted an entire block in the city of Dayton, Ohio. APP., p. 55. The purchase price of the entire city block was $315,000. APP., p. 2. A portion of the land, other than the building and property at issue in this case, was sold for $250,000. APP., p. 2. BSW then had a total investment remaining of $65,000 for the property.

Originally constructed in 1876, the Wilcon Building was one of Dayton's oldest warehouses, and one of the few industrial buildings still standing along the route of the Old Miami-Erie Canal. APP., p. 55. Known historically as the "Gebhart-Pope Mill," the structure had been used primarily as a linseed oil manufacturing plant, a flour mill and a tobacco warehouse.

In 1985, the City of Dayton reviewed the Wilcon Building site and determined it to be eligible for listing as a national historic landmark on the Ohio Historical Inventory.

I. PETITIONER MISSTATES THE FACTS CONCERNING THE PROPERTY'S ELIGIBILITY FOR HISTORIC LANDMARK STATUS.

Contrary to Petitioner's factual assertion, the State had not rejected listing of the building. The alleged "rejection" was a rejection of a historical "district," which did not specifically relate to the Wilcon Building itself. The district, which included essentially three or four city

blocks, was rejected in approximately June of 1985. Thereafter, a separate Ohio Historical Inventory form to the Ohio Historical Society was filed with respect to the property itself, indicating the property was eligible. There is no dispute that the property itself was eligible for listing under the Ohio Historical Inventory. APP., p. 56.

At the time BSW purchased the property, the building housed three tenants operating three separate businesses out of the premises. APP., p. 1. One-third of the building was occupied by Dayton Tire Sales, a retail tire business, which included service bays for the installation of tires and other automotive work, as well as offices and a warehouse for the storage of tires and materials. *Id.*, APP., p. 19. Dayton Tire operated out of that building from 1973 up until it was evicted by BSW in 1989 at the time BSW applied for the demolition permit. At the time of its eviction, Dayton Tire was paying approximately $23,000 per year in rent for the space it occupied. APP., pp. 2, 23.

Another one-third of the building was occupied by a mechanical contracting company, Wat-Kem Contractors. That portion of the property was also used as office-warehouse space. It is not clear when Wat-Kem exited the premises.

The remaining one-third of the building was occupied by Wilcon Construction Company, a general contractor. APP., p. 1. The owner of Wilcon Construction, Dennis Williams, is a partner in BSW, the owner and landlord of the building. Wilcon used its portion of the building for office space, a millwork shop and storage. Wilcon began

operating out of the building in 1976, eight years before BSW purchased the site.

Wilcon Construction later expanded its operation in the building and moved its offices from the second floor to the third floor. APP., p. 2. At that time, Wilcon Construction refurbished its one-third of the Wilcon Building, leveling the floors, putting in carpeting, putting up drywall, and remodeling the entire third floor. *Id.* The remodeling included the creation of new offices, a computer room and kitchen. *Id.* Wilcon also refitted the electrical and sanitary systems. *Id.* Wilcon Construction operated its business in that building from 1976 to 1989 without interruption, up to the time BSW sought a demolition permit for the building.

In 1988, BSW demolished an abandoned gas station next to the Wilcon Building and developed a three-story office building on that site. BSW continued to rent the adjacent Wilcon Building to the tenants, and collected rent up to the time it sought the demolition permit.

On March 14, 1989, BSW applied for a demolition permit for the Wilcon Building with the City of Dayton's Division of Inspectional Services. Since the Wilcon Building was eligible for listing on the National Register of Historical Places, the Landmark Commission of the City of Dayton had jurisdiction to review such demolition permit requests.

On March 29, 1989, BSW applied to the Landmark Commission for a certificate of appropriateness to obtain a demolition permit under city ordinance. City ordinance provided that the certificate of appropriateness would be issued if "the square foot cost of meeting the minimum

building code would exceed the square foot market value of similarly used and improved structures in the planning district."

Hearings were held on the request for a certificate of appropriateness in April of 1989. After testimony by witnesses, and a review of evidence, including a site inspection and testimony by independent real estate experts, the request for a certificate of appropriateness for the demolition permit was denied. BSW filed an administrative appeal of that decision.

At the time BSW sought its demolition permit, the building was still operated as an office-warehouse. At that time, BSW essentially abandoned the building. APP., p. 20. In order to prepare the building for demolition, BSW was required to evict at least one of the tenants, Dayton Tire Sales. APP., p. 20. Dayton Tire Sales did not leave the building until May of 1989, after BSW sought the demolition permit.

II. PETITIONER MISSTATES THE FACTS AS TO THE CONDITION OF THE BUILDING AT THE TIME THE DEMOLITION PERMIT WAS SOUGHT.

Contrary to Petitioner's assertions, the building was neither a dangerous fire trap nor "in need of demolition." An examination and inspection by the Dayton Building Inspector at the time the demolition permit was being considered found that the building was structurally sound and that there were only three code violations that needed remedied. APP., pp. 6, 21. Moreover, at the time

BSW applied for the demolition permit, at least one tenant, Dayton Tire Sales, was still fully operating out of the building as it had for the previous 18 years.

BSW essentially abandoned the building after evicting Dayton Tire Sales. At that time, BSW cut all power and heat off from the building. APP., pp. 5, 20. After requesting the demolition permit, BSW performed no other maintenance of any significance on the building, other than attempting to keep trespassers out. APP., p. 22.

From the time the demolition permit was denied, BSW took no action whatsoever with respect to the building, asserting during the hearings on the certificate of appropriateness that, if it did not get the demolition permit, the City would have to "purchase" the property. Despite the fact that the property was located in the commercial district of the city of Dayton (and had housed three commercial tenants in the previous 18 years), no efforts were made to place tenants in the building, no marketing nor any other efforts were taken to use the building in any economic fashion.

The evidence at the time of the denial of the demolition permit was clear – the building had been used since 1973 as an office-warehouse by several commercial tenants. Tenants operated in the building, paying rent up until the date BSW sought the demolition permit. At least one of the tenants had to be evicted in order to completely abandon the building. Because BSW chose not to use the property, operate any business out of the property, or even market the property as a business, and took

no action to maintain the building, BSW could not credibly claim that the denial of the demolition permit created a "taking" of the property.

After the denial of the demolition permit, BSW asserted an administrative appeal to the common pleas court. In that appeal, BSW asserted several other claims in addition to its administrative appeal, including alleged constitutional violations.

In July of 1991, during the pendency of the administrative appeal, BSW filed a separate lawsuit against the City of Dayton, seeking declaratory judgment and alleging a "taking" of the property. That lawsuit was eventually dropped by BSW.

The administrative appeal was referred to a visiting judge and, eventually, a judgment was rendered on the administrative appeal on December 4, 1991. In that decision, the trial court found the application of Dayton's Historical District Ordinance was unconstitutional.

The City of Dayton appealed that decision and, on May 7, 1993, the Court of Appeals for the Second Appellate District rendered its decision. In that decision, the Court of Appeals held that the constitutionality of the statute was not necessary to determine the administrative appeal and that, based on the evidence presented at the hearings, the requirements of the ordinance were met and the Landmark Commission incorrectly denied the certificate of appropriateness for the demolition permit. APP., pp. 57-59. The Court determined that BSW should have been granted the demolition permit, but that the constitutionality of the statute was unnecessarily decided.

Based on the Court's decision, the City of Dayton notified BSW that it was prepared to issue a certificate of appropriateness for a demolition permit immediately. APP., p. 34. However, BSW refused to apply for the demolition permit and refused to take any action with respect to demolishing the bu..ding, based on its position, as it had been from the beginning, that the City of Dayton had "taken" its property by originally denying the demolition permit. APP., p. 34.

III. PETITIONER MISREPRESENTS THE CONDITION OF THE REAL ESTATE MARKET.

Contrary to Petitioner's claims, the "downturn" in the real estate market did not occur in 1993. The evidence at the hearings in this case demonstrated that the economic downturn occurred in 1988, **before** BSW sought the demolition permit. BSW's own expert acknowledged that the proposed development by BSW would have been "difficult" at best in 1988, if BSW had gone forward with the proposed development.

IV. PETITIONER MISREPRESENTS THE EFFECT OF THE "REUSE PLAN" REQUIREMENT.

Petitioner misstates the record when it claims that the "request" for a "reuse plan" was not a "simple one to fulfill." Both the Court of Appeals and the Ohio Supreme Court noted that the request for a reuse plan was a ministerial function and did not require any specific use, nor any detailed plans for any specific kind of development. APP., pp. 4, 41. The Court of Appeals noted that seeding and grading the lot could have been a proposed

use and that the "reuse plan" requirement was not a bar to using the property after 1993. APP., p. 41.

Thereafter, BSW filed its next lawsuit, alleging a taking and other federal claims, in state court. Based on the predominance of the federal claims, the matter was removed to federal court. At that time, the federal district court noted that one of the plaintiff's claims, the "takings" claim, was not ripe and dismissed that claim, noting that the appropriate procedure in Ohio is to seek to compel eminent domain proceedings via mandamus. Thereafter, BSW filed this action in the Ohio Court of Appeals, seeking a writ of mandamus to compel the City to condemn the property.

In the Court of Appeals, BSW filed for summary judgment on its request for mandamus, submitting evidence and documentation to support its claim for a "taking." The City of Dayton responded and, on March 27, 1996, the Court of Appeals for Montgomery County, Ohio, Second Appellate District, issued its decision. APP., p. 31.

The court held that BSW's alleged inability to currently develop the property was due to BSW's own inaction, which could not support any argument that the government had taken its property. APP., p. 41. The Court further noted that the demolition permit was available to BSW and that no obstacles existed in its attempt to obtain such a permit. *Id.* The court held that the submission of a reuse plan was an insubstantial and ministerial requirement and that BSW was not prohibited by the City from obtaining a demolition permit in 1993. APP., pp. 41, 52.

The Court of Appeals held that no permanent "taking" existed. APP., p. 41. The Court of Appeals then examined BSW's claim of a "temporary taking" during the time when the demolition permit was denied, from 1989 to 1993. APP., p. 42. In so reviewing the "temporary taking" issue, the Court of Appeals noted the standard under which it reviewed such a claim by quoting from the United States Supreme Court decision in *United States v. Riverside Bayview Homes, Inc.* (1985), 474 U.S. 121, as follows:

> *Only when a permit is denied and the effect of the denial is to prevent "economically viable" use of the land in question can it be said that a taking has occurred.*

APP., p. 44 (quoting *United States v. Riverside Bayview Homes, Inc.*, (1985), 474 U.S. 121, 126-27 (emphasis in Court of Appeals Decision). The Court of Appeals for Montgomery County, Ohio, then stated the remaining issue to be determined for a "temporary taking" as follows:

> **Therefore, the true question is whether the denial precluded BSW's "economically viable" use of the Wilcon property.**

APP., p. 44 (citations omitted).

The Court of Appeals then reviewed the remaining evidence as to the question of "economically viable" use of the property. The Court noted that it was considering and reviewing the remaining evidence for determination of "economically viable" use. APP., pp. 44-45.

The Court of Appeals found that the Wilcon property had been used as a commercial warehouse prior to BSW's application for a demolition permit. APP., p. 46. Moreover, the property retained an "as is" value of $220,000. APP., p. 46. The Court noted there was no reason the Wilcon Building could not be used as an office-warehouse after the denial of the demolition permit and that the permit denial did not result in the property losing rental value or resale potential. APP., p. 46.

However, Dwight Brannon, a partner in BSW and the attorney representing BSW in the case, filed his own affidavit stating that the permit denial rendered the property "unmarketable and useless." *Id.*, p. 52. As a result, the Court referred the matter for an evidentiary hearing to determine whether the City's 1989 denial of a demolition permit deprived BSW of all use of its property. APP., p. 53. That charge was based upon the Court of Appeals' previous determination and evaluation of a "temporary taking," i.e., the issue involving continuing "economically viable" use.

Hearings were held on three separate days, and several witnesses, including expert witnesses, were called by both parties. After hearing all testimony, evaluating the witnesses' demeanor, and examining the testimony at issue, the Special Master issued a report and recommendation finding that BSW had not been denied use of the premises. APP., p. 18.

V. PETITIONER MISREPRESENTS THE FINDINGS OF THE SPECIAL MASTER.

In the factual findings, the Special Master did not hold that viable use existed solely because BSW used the premises for paid public parking and the storage of wrecked vehicles. To the contrary, the Special Master specifically found that the building had valid and marketable use as an office-warehouse, the identical use to which the property had been put in the decades before BSW sought the demolition permit. APP., pp. 21-22.

In the findings of fact, the Special Master found that, during the years the building was owned by BSW, it was occupied by three separate businesses that operated out of the building, up to the time BSW sought the demolition permit. One of the tenants, Dayton Tire Sales, operated out of the building for 18 years before being evicted by BSW. APP., p. 20. The Special Master found that Dayton Tire Sales, at the time it was evicted, was paying $23,000 annually in rent. *Id.* The Special Master further noted that Wat-Kem, another tenant of the building, also operated out of the building and used one-third of the building as an office-warehouse. *Id.* Wat-Kem operated a mechanical contracting business out of the building.

In addition, the remaining one-third of the building was occupied by Wilcon Construction, a general contracting company owned by Dennis Williams, a partner in BSW Development. *Id.* Wilcon Construction had operated its business out of that building since 1976. After BSW purchased the property in 1984, Wilcon refurbished its portion of the building, creating new offices and remodeling the third floor of the building. APP., p. 2. The Special

Master found that Dennis Williams paid between $12,000 and $18,000 in annual rent at the time BSW sought the demolition permit. APP., p. 20. It was conceded at the hearing that the amount of rent charged to Wilcon Construction was nominal because of Mr. Williams' partnership in BSW.

The Special Master found that BSW voluntarily requested all power leads be disconnected and that BSW essentially abandoned the building. APP., p. 20. The Special Master found that the building would not require any significant work to reoccupy with other tenants. APP., p. 21. The Special Master found that the cost of repairing the hazards in the building that existed at the time BSW abandoned the building was not significant and that such repairs would have allowed BSW to lease those portions of the building to a tenant performing essentially the same functions as either Dayton Tire or Wilcon Corporation. The Special Master found that commercial use of the building was available at the time the demolition permit was denied and that BSW had the ability to market the property. APP., p. 22.

Although the Special Master found that BSW did make use of the premises for paid parking and the storage of wrecked automobiles, that finding was not the sole basis for denying the writ of mandamus. Essentially, the Court noted that in addition to being able to use the premises as a commercial office-warehouse, BSW made actual use of the premises. APP., pp. 20-21. BSW sold parking spaces on the remaining portions of the lot for public parking at $25 per space per month. APP., p. 21. BSW also used the premises for the storage of various items, which included wrecked cars and boats that were

being stored by Dwight Brannon as part of his legal practice. APP., p. 20.

VI. PETITIONER MISREPRESENTS THE FINDINGS OF FACT OF THE OHIO SUPREME COURT, COURT OF APPEALS, AND SPECIAL MASTER.

Contrary to Petitioner's assertion, there was no "solitary factual finding." The Special Master, the Court of Appeals, and the Ohio Supreme Court all determined that the building retained viable commercial use as an office-warehouse. APP., pp. 11-12; 46-47; 20-22. The Special Master found that portions of the building were marketable for warehouse and office space and could have been used for such purposes again. APP., pp. 20-22. The courts noted there was no significant impediment to BSW reusing the building as it had during the 18 years before the demolition permit was sought. Moreover, any problems or dilapidation of the building was the result of BSW's actions, not the City of Dayton's denial of the demolition permit. *See* APP., p. 26.

After the findings of fact and conclusions of law were submitted by the Special Master, BSW appealed that determination to the Ohio Supreme Court. In a per curium decision, the Ohio Supreme Court affirmed the lower court's ruling. In so ruling, the Ohio Supreme Court noted that the appropriate standard for review of the "takings" claim was whether the denial of the demolition permit prohibited all "economically viable use." The Court stated the standard as follows:

> BSW could only establish entitlement to appropriation proceedings if it established that Appellee's denial of the demolition permit denied BSW all economically viable use of the Wilcon Building property.

APP., pp. 10-11.

The Ohio Supreme Court noted that BSW abandoned the Wilcon Building, which abandonment resulted in a hazard to the public, including homeless persons trespassing on the property. APP., p. 5. The Ohio Supreme Court noted that BSW had the heat and electricity to the building disconnected, and ignored requests by City officials to secure the property for the safety of the public. *Id.* The Court set forth the temporary regulatory taking issue as follows:

> "In order for the landowner to prove a [regulatory] taking, he or she must prove that the application of the ordinance has infringed upon the landowner's rights to the point that there is no economically viable use of the land and, consequently, a taking has occurred for which he or she is entitled to compensation."

APP., p. 10 (citing *Goldberg Cos., Inc. v. Council of Richmond Hts.* (1998), 81 Ohio St.3d 207, 210, 690 N.E.2d 510, 512).

After reviewing the evidence and testimony submitted at the hearings, the Ohio Supreme Court affirmed the Court of Appeals, holding that BSW did not establish a compensable taking. APP., pp. 11-12. In so holding, the Ohio Supreme Court relied upon the credible evidence, including testimony by the City of Dayton's chief building official, that the Wilcon Building was structurally sound and that the building tenants would not require

new certificates of occupancy to continue previous tenants' uses. APP., p. 12. The Ohio Supreme Court found the commercial use of the premises for the years before the denial of the demolition permit could have continued and that the building could have been used for similar commercial purposes by BSW. *Id.* Finally, the Ohio Supreme Court noted that the property retained an "as is" value of $220,000. APP., p. 3.

Although the Ohio Supreme Court noted that BSW made actual use of the property for parking and storage, that was not the basis for the determination of economic viability. The facts demonstrated that the property had commercial use and viability as an office-warehouse. APP., p. 12.

The City of Dayton did not affect or prevent those continued uses during the administrative appeal of the demolition permit. BSW simply chose not to make use of those premises, made no efforts to maintain the building, and made no efforts to market the building or re-tenant the building during that time. Based on these specific factual findings, no "taking" existed, and the request for mandamus was rejected.

REASONS FOR DENYING THE WRIT

The uniquely fact-sensitive "takings" claim of Petitioner was thoroughly presented and evaluated by the courts below and does not warrant review by this Court. The decision of the Ohio Supreme Court was a patently correct application of settled law, and no conflict of law

nor any dispute as to the standard used to evaluate the claim exists.

I. THE EVIDENCE AND TESTIMONY ESTABLISHED THE COMMERCIAL USE AND ECONOMIC VIABILITY OF THE PROPERTY – NO DISPUTE AS TO THE DEFINITION OF THE PHRASE "ECONOMICALLY VIABLE" WAS RAISED IN THE LOWER COURTS.

Contrary to Petitioner's claim, this case does not present any issue as to the appropriate standard to apply in a "takings" claim. The question of the definition of the phrase "economic viability" was not raised in the courts below.

Rather, this case, as in all alleged regulatory takings, involved a complex, factual inquiry into the uses of the premises, and the uses of the property that existed at the time of the denial of the demolition permit. In this case, the evidence and testimony established that the property had viability as a commercial office-warehouse located in the City of Dayton's commercial district, as established by the property's use up until the date of the request for the demolition permit. The denial of the permit to demolish the commercial office-warehouse in no way altered or changed the viable uses to which the property had been put in the previous decades.

The United States Supreme Court has long noted that no magic formula exists to determine when a regulatory taking has occurred. *Ruckleshaus v. Monsanto*, 467 U.S.

986, 1004 (1984). A "regulatory" taking claim is intensely fact-sensitive, and the analysis itself is "essentially an ad hoc, factual inquiry." *Id.*, (citing *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979); *see also Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). Contrary to Petitioner's assertions, this Court has established clear and specific guidelines for examining and reviewing claims of regulatory takings. *See, e.g., Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 83 (1980); *Kaiser Aetna*, 444 U.S. at 175; *Penn Central*, 438 U.S. at 124.

The guidelines and analysis for determining a regulatory taking were applied to the evidence and testimony submitted by BSW in the three days of hearing. After carefully construing all of the evidence and the testimony by all witnesses, the Ohio Supreme Court held that the property retained economic viability during the administrative appeal of the demolition permit, and that the denial of the demolition permit did not prohibit all economically viable use, such as office-warehouse.

The Ohio Supreme Court specifically incorporated and applied the standards set forth by the United States Supreme Court in *United States v. Riverside Bayview Homes, Inc.* (1985), 474 U.S. 121, 127, as to permit denials:

> A requirement that a person obtain a permit before engaging in certain use of his or her property does not itself "take" the property in any sense: after all, permission may be granted, leaving the landowner free to use the property as desired. Moreover, even if the permit is denied, there may be other viable uses available to the owner. Only when a permit is denied and

> the effect of the denial is to prevent "economically viable" use of the land in question can it be said that a taking has occurred.

Id., APP., p. 10 (quoting *United States v. Riverside Bayview Homes, Inc.* (1995), 474 U.S. 121, 127, 106 S. Ct. 455, 459, 88 L.Ed.2d 419, 420). Petitioner misstates the Ohio Supreme Court's holding by claiming the Ohio Supreme Court found economic viability ***solely*** because of the uses of storage and parking onsite. To the contrary, the facts established at trial, and the holding of the Ohio Supreme Court, specifically relied upon the evidence that the building had economic viability as an office-warehouse. APP., pp. 21-22; 11-12.

What Petitioner fails to note, and what the Ohio Supreme Court, as well as the Court of Appeals, relied upon to determine economic viability was the fact that the building and the premises were used as an office-warehouse by several commercial tenants up until the time BSW sought its demolition permit. APP., pp. 11-12; 46-47; 20-22. The lower courts noted that valid commercial use as office-warehouse occurred during the 18 years before the demolition permit was sought, and that use was still available during the pendency of the administrative appeal. Specifically, the Ohio Supreme Court stated:

> The City's chief building official testified that the Wilcon Building is structurally sound and that building tenants would not require new certificates of occupancy if they continued previous tenants' uses. In addition, at least two-thirds of the building had been used by at least two different businesses for several years just before the denial of the demolition permit, and

> that portion of the building could have continued to have been used by those businesses if they had not vacated the building.

APP., p. 12. Although, the Ohio Supreme Court did note that the property was actually used for public parking and for storage after the denial of the demolition permit, those actual uses were not the sole basis for the court's determination that the property retained economic viability.

The denial of the demolition permit did not prevent or affect the property's use and function as commercial office-warehouse space. APP., pp. 12, 20-21. That use existed for at least 18 years before the demolition permit was denied and the evidence presented in the court below demonstrated that such use could have continued after the denial.

This Court has noted that government action can reduce or decrease property values and profits of a particular property without constituting a "taking." Allegations that a regulation prevents the most profitable or best use of the property do not constitute a taking. *Goldsblatt v. Hempstead*, 369 U.S. 590, 592 (1962). Rather, the standard used to gauge whether a regulation has "taken" property is "when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992).

Evidence and testimony were presented in the court below on the issues of economic return of the premises, including rental value of the property, fair market value

of the land and building, and marketability of the property. APP., p. 3. All of the evidence was evaluated and examined, ultimately resulting in the Ohio Supreme Court's finding that the property retained economically viable use as a commercial office-warehouse and an "as is" value of $220,000. The property was not rendered "economically idle" and the facts supported the finding that no taking occurred.

II. THIS CASE DOES NOT INVOLVE ANY CONFLICT REGARDING THE STANDARD OF A TAKING, EITHER PERMANENT OR TEMPORARY.

Contrary to Petitioner's claims, the Court of Appeals did not assert that a different standard involved the review of a temporary versus permanent taking. The Court of Appeals specifically noted that the standard applicable to a temporary taking is that set forth by this Court in *United States v. Riverside Bayview Homes, Inc.* (1985), 474 U.S. 121, 126-27. The Court of Appeals relied upon that decision when it set forth the remaining issue, as follows:

> In the present case, the denial of BSW's demolition permit from October 16, 1989, until our decision on May 7, 1993, is undisputed. **Therefore, the true question is whether this denial precluded BSW's "economically viable" use of the Wilcon property.**

APP., p. 44 (emphasis added).

The Court of Appeals then reviewed all of the evidence, noting that the testimony from the Landmark Commission, and other evidence, demonstrated that the

Wilcon property had been used as a commercial warehouse and office-warehouse for the decades before BSW sought the demolition permit. The Court noted, after reviewing all of the evidence, that:

> Despite these unfortunate economic circumstances, we cannot agree that the City's conduct constituted a taking of BSW's property. Prior to its application for a demolition permit, BSW utilized the Wilcon Building as a warehouse, and presumably, it could have continued doing so after the City denied its permit. At the time of BSW's permit application, the Wilcon Building allegedly retained an as-is value of $220,000. Consequently, BSW has not demonstrated that the City's permit denial precluded "all use" of the property. Therefore, pursuant to *First English, supra*, BSW has not established a temporary regulatory taking of its property.

Id., at 47. That opinion was rendered in the denial of summary judgment. However, because Petitioner's attorney, Dwight Brannon, filed his own affidavit claiming that the denial of the permit "rendered the property unmarketable and valueless," the Court of Appeals could not conclusively state that no taking had occurred and ordered a hearing on the issue before a Special Master appointed by the Court. APP., at 52.

The Court of Appeals charged the Special Master with the duty of receiving evidence and testimony to determine whether the denial of the permit denied BSW all use of the property. However, that charge was issued in the context of its decision on the summary judgment motion wherein it noted that the appropriate standard was economic viability.

The Ohio Supreme Court noted these distinctions in its decision. In a per curium decision, the Ohio Supreme Court reviewed the evidence set forth at the hearing and applied the standard of "economic viability" to the temporary taking claim as follows:

> A requirement that a person obtain a permit before engaging in certain use of his or her property does not itself "take" the property in any sense: after all, permission may be granted, leaving the landowner free to use the property as desired. Moreover, even if the permit is denied, there may be other viable uses available to the owner. Only when a permit is denied and the effect of the denial is to prevent "economically viable" use of the land in question can it be said that a taking has occurred.

APP., p. 10 (quoting *United States v. Riverside Bayview Homes, Inc.* (1995), 474 U.S. 121, 127, 106 S. Ct. 455, 459, 88 L.Ed.2d 419, 420. That is the precise standard Petitioner claims was ***not*** applied.

The crux of Petitioner's claim is succinctly set forth in the last sentence of footnote 14 of Petitioner's Brief, wherein Petitioner states that "if the Ohio Supreme Court thought it was applying the 'economically viable use' standard, the facts simply cannot support it." *See* PETITIONER'S BRIEF, p. 21, n. 14. Petitioner simply claims the facts do not support the finding that the building in question had economically viable use as an office-warehouse, the precise use that the building was put to during the preceding decades before the demolition permit was sought. That dispute with the factual findings of the lower courts creates no basis for review by this Court.

Whether other decisions in other jurisdictions are in conflict, or alleged conflict, with previous United States Supreme Court precedent creates no basis for acceptance of this case. Those decisions are not relevant to, nor involved in, the issues in this case. This case, as set forth by the Ohio Supreme Court's decision, specifically applies the "economically viable" standard argued by Petitioner and set forth in the Court's most recent pronouncement in *United States v. Riverside Bayview Homes, Inc.* (1985), 474 U.S. 121.

That is the decision relied upon by both the Court of Appeals and the Ohio Supreme Court to establish the standard applicable to the issues herein, whether the denial of the demolition permit during the time from 1989 to 1993 denied BSW economically viable use of the land. Pursuant to that standard, the Ohio Supreme Court specifically determined that economically viable use was not prohibited by the demolition permit based on the obvious valid uses of the property as an office-warehouse. Simply because BSW chose not to use the property does not mandate that economically viable use was not available.

The decisions cited from Louisiana, Delaware and California were not at issue in this case and were not asserted as a basis for judgment. Rather, the lower courts and the Ohio Supreme Court specifically applied United States Supreme Court precedent in making their determination. Thus, the alleged "conflict" simply does not exist and creates no basis for asserting a review by this Court.

The citation by Petitioner to *Sintra, Inc. v. Seattle*, 829 P.2d 765 (Wash. 1992), *cert. denied, Seattle v. Robinson*, 506

U.S. 1028 (1992), creates no basis for this Court's review. Petitioner fails to note to this Court that the property in question in *Sintra* was essentially vacant at the time the landowner acquired it, unlike the property in this case that had commercial tenants paying rent. Moreover, in *Sintra*, no tenant was evicted by the property owner. In addition, evidence was presented that the owners were unable to find tenants for the building despite repeated attempts. In this case, BSW actually evicted its tenants and never sought any new tenants for the building after the demolition permit was denied. Finally, and perhaps most importantly, the court in *Sintra* held that an issue of fact existed as to whether a taking occurred and that a trial must be held on the issue. The court in *Sintra* did *not* find that a compensable taking existed.

Unlike the decision in *Sintra*, a hearing in this case has been held, and testimony and evidence have been presented on this very issue. After three days of testimony, the courts determined that the property retained viable commercial use and that no compensable taking existed.

Essentially, the decision in *Sintra* merely reinforces the fact that all takings claims are ad hoc, factual inquiries appropriate for trial and hearing. As such, those complex factual inquiries are more appropriately resolved at the trial court and state court level and are not appropriate for review by this Court.

Petitioner further misstates the state of this case by claiming that a conflict exists between Ohio and jurisdictions in Connecticut, Rhode Island, Nebraska and Florida. Contrary to Petitioner's assertion, the state of Ohio

clearly recognizes a temporary taking action during the pendency of the administrative appeal. In fact, that was the precise holding of the Court of Appeals when it examined and reviewed BSW's petition for mandamus. The Court of Appeals for Montgomery County, Ohio, Second Appellate District, stated the following:

> As we explained above, however, BSW's current lack of a demolition permit stems from its failure to submit a reuse plan. Following this Court's May 7, 1993, decision, no other impediment prevented BSW from obtaining a permit, demolishing the building, and undertaking any use it desired. Consequently, we cannot agree that a taking of BSW's property continues to the present day. Instead, we believe the issue is whether a temporary regulatory taking occurred from October 16, 1989, when the Dayton Board of Zoning Appeals affirmed the Landmark Commission's decision denying a demolition permit, until May 7, 1993, when this Court ruled that BSW should receive a permit.
>
> * * *
>
> In the present case, the denial of BSW's demolition permit from October 16, 1989, until our decision on May 7, 1993, is undisputed. Therefore, the true question is whether this denial precluded BSW's "economically viable" use of the Wilcon property.

APP., pp. 42-44.

Thus, contrary to Petitioner's assertion, Ohio, and specifically this case, did not engage in any different approach for determining the time period for the alleged regulatory taking. The Court of Appeals for Montgomery

County, Ohio was, in actuality, in complete agreement with those jurisdictions referred to by Petitioner by specifically holding that the pertinent time period for review is when the final decision of the administrative board was made in 1989 until 1993 when BSW had the ability to use the property in any way it deemed proper. Contrary to Petitioner's assertion, there is no incompatible doctrinal approach at issue in this case. The decisions in this case were, in fact, completely in line with the precedent of this Court.

III. NO CONFLICT BETWEEN COURTS EXISTS.

Petitioner's reliance upon *Seawall Associates v. City of New York*, 542 N.E.2d 1059 (N.Y. 1989), for an alleged "conflict" creates no basis for review by this Court. Petitioner's factual predicate that *Seawall* is similar is misplaced. The facts in *Seawall* are different from the facts in this case.

In *Seawall*, the statute at issue absolutely compelled the owners of the building to restore all units to habitable condition, to lease them at controlled rents to specific individuals, and to admit specific persons as tenants. In addition, the statute absolutely prohibited demolition, alteration or conversion of the properties. The New York court found that the provisions at issue ***prevented any economically viable use*** of the properties by the owners. The New York court found that:

> Owners are forced to devote their properties to another use, which, albeit one which might serve the city's interests, bears no relation to

> any economic purpose which could be reasonably contemplated by a private investor.

Seawall Associates, 542 N.E.2d at 1065. The court in *Seawall* specifically found that "by any test, we think these restrictions deny the owners 'economically viable use' of their properties." *Id*. The decision in *Seawall* is not in conflict with the Ohio Supreme Court's decision. *Seawall* stands for nothing more than the undisputed proposition that the denial of all economically viable use of a property can constitute a taking.

Unlike *Seawall*, the Ohio Supreme Court held that the denial of the demolition permit did not deny economically viable use of the properties. Rather, the evidence clearly demonstrated that the property purchased by BSW could be used for the same identical purposes for which the property was put in the decades before the demolition permit was sought, and in the five years that BSW owned the building before it sought the demolition permit. APP., pp. 11-12; 20-22. Unlike the decision in *Seawall*, BSW owned and operated the building as a commercial office-warehouse premises for a period of five years before it sought the demolition permit. The demolition permit did not stop, alter or prohibit those continued uses during the administrative appeal.

Economic viability was not affected in any way by the denial of the demolition permit. Further, the decision in *Seawall* relates to a specific statute, which directly and completely regulated the identical uses that could be made of the property. No such statute is at issue in this case.

The reliance on the "bundle of sticks" analogy to create a conflict in this matter is misplaced. In fact, the court in *Seawall* identified the ***very distinction*** that demonstrates ***why*** no conflict exists. The *Seawall* court acknowledged the United States Supreme Court decision in *Penn Central Transp. Co. v. New York City*, 505 U.S. 1003 (1978), as demonstrating a relevant distinction from the facts in *Seawall*. The court noted that distinction as follows:

> The effect of Local Law No. 9 is unlike that of the landmarks law in *Penn Central*, which denied the owner of Penn Central neither the continued full use of its property nor a reasonable return on its investment.

Id., at 1066.

Just as in *Penn Central*, the owners in this case (BSW) were not denied the continued full use of their property nor a reasonable return on their investment. The evidence and testimony at the hearing established that the building could continue to be used effectively as an office-warehouse.

As a result, no conflict exists between Ohio and the 1989 New York decision, and that decision does not create any basis for review by this Court.

CONCLUSION

Based on the foregoing, Respondent submits no basis exists for this Court's review and that BSW's petition should be denied.

Respectfully submitted,

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